Supreme Court, U.S.
FILED

'99 56 JUL 6 1999

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

JIMMY D. GILES, PETITIONER

v.

SONS OF CONFEDERATE VETERANS, INC., RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JIMMY D. GILES
Pro Se
2000 Nathan Bedford Forrest Complex
Jackson, MS 39208-9421
(601) 933-2000

539

QUESTIONS PRESENTED

Petitioner and a corporate Defendant not a party to this petition were sued for infringing the registered service mark of Respondent by publishing on an Internet website devoted to political advocacy a logo alleged to be confusingly similar to the service mark. The petition is to review a Judgment of the District Court enjoining further use of the logo and awarding Respondent $3.00 in damages and $25,164.01 in attorney's fees which was affirmed by the Circuit Court of Appeals. Petitioner argues that the District Court erred in denying Defendants' motions to dismiss the complaint claiming their actions were protected by the First Amendment. The questions presented are:

1. Whether statutes which impinge upon free expression of political ideas may be construed broadly.

2. Whether the power of Congress to regulate interstate commerce is so broad as to comprehend the granting of a monopoly of certain methods of expressing political ideas to a non-political entity such as the Respondent.

3. Whether a person's rights to freedom of political expression is subject to the proprietary interests of others which have been created by the Congress pursuant to its power to regulate interstate commerce.

4. Whether statutes may be applied so as to suppress certain methods of political expression as long as alternate methods of expression are available.

5. Whether an imprecisely defined category of methods of political expression, such as those which may be deemed by individual Judges or Jurors to be confusingly similar to a certain registered service mark may be subjected to prior restraint by means of an injunction prohibiting their use.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

No subsidiaries or parent companies are involved.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 2

I. THE FIFTH CIRCUIT HAS DECIDED SEVERAL IMPORTANT FEDERAL QUESTIONS IN A WAY THAT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT 3

A. The Fifth Circuit has by affirming the judgment below without comment putatively held that statutes which impinge upon the right of free political expression may be broadly interpreted regardless of the absence of a compelling national interest, contrary to decisions of this Court. 3

B. The Fifth Circuit has by such affirmation putatively held that the First Amendment permits a role for Congress in regulating political debate to protect viewers of Internet websites from being deceived or confused as to the origin of political messages displayed thereon, contrary to decisions of this Court. 4

C. The Fifth Circuit by such affirmation has putatively held that although Congress may not punish the burning of the American flag in protest against government policy, the same protester could be subjected to civil penalties under the Lanham Act for infringement of a registered service mark having a high degree of political significance which occurred incidentally in the process of political protest, contrary to decisions of this Court..... 5

D. The Fifth Circuit has by such affirmation putatively held that political speech is entitled to no greater degree of First Amendment protection than commercial speech, contrary to decisions of this Court..... 9

E. The Fifth Circuit has by such affirmation putatively held that an imprecisely defined category of methods of political expression may be subject to prior restraint by injunction covering all such methods which may be deemed to be "confusingly similar" to a certain service mark by Judges or Jurors in future enforcement actions. Although "confusingly similar" has no fixed determinate meaning but is subject to individual judgment of the persons involved. Narrow guidelines and compelling national interest required by the decisions of this Court for suppression of political expression are absent in this case..... 10

F. The Fifth Circuit has by such affirmation putatively held that certain methods of political expression may be suppressed, as long as alternate channels of communication are available, contrary to decisions of this Court..... 11

CONCLUSION 12

INDEX OF APPENDICES

Page

APPENDIX A **Opinion of the Court Of Appeals** 13

APPENDIX B **Opinion of the District Court** 15

APPENDIX C **Court of Appeals Order Granting Respondent an Attorney Fee Award in the Amount of $3,497.40** 17

APPENDIX D **District Court Order Granting Respondent an Attorney Fee Award in the Amount of $21,666.61** 18

APPENDIX E **District Court Opinion and Order Denying Motion to Dismiss for Lack of Jurisdiction** 22

APPENDIX F **District Court Opinion and Order Denying Motion for Judgment on the Pleadings and Motion for Summary Judgment** 23

APPENDIX G **Motion for Judgment On the Pleadings Dismissing the Complaint** 33

APPENDIX H **Motion for Summary Judgment** 35

APPENDIX I **Motion for Dismissal for Lack of Jurisdiction** 41

APPENDIX J **The Lanham Act (15 U.S.C. §1114 *et seq.*)** 43

APPENDIX K **28 U.S.C. §1332 *et seq.*** 46

TABLE OF AUTHORITIES

Page

CASES

Armstrong Cork Company and Armstrong World Industries, Inc., v. World Carpets, Inc., et al., 597 F.2d 496 (5th Cir. 1979) 10
Bantam Books, Inc. et al. v. Sullivan et al., 372 U.S. 58 (1963) 11
Barenblatt v. U.S., 360 U.S. 109 (1959) 5
Cantwell et al. v. Connecticut, 310 U.S. 296 (1940) 5
Capitol Square Review and Advisory Board et al. v. Pinette et al., 94-780 (1995) 4
City of Houston, Texas v. Hill, 482 U.S. 451 (1987) 5
Country Floors, Inc. v. A Partnership Composed of Charley Gepner and Gary Ford, d/b/a Country Tiles, 930 F.2d 1056 (3rd Cir. 1991) 11
Dallas Cowboys Cheerleaders, Inc., v. Pussycat Cinema, Ltd. and Michael Zaffarano, 604 F.2d 200 (2nd Cir. 1979) 6
First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts, 435 U.S. 765 (1978) 4
Ginger Rogers v. Alberto Grimaldi, MGM/UA Entertainment Co., and PEA Produzione Europee Associate, S.R.L., 875 F.2d 994 (2nd Cir. 1989) 7
John A. Boehner v. James A. McDermott, Civ. No. 98-594 (TFH) DDC (1998 U.S. Dist. LEXIS 11509) 5
Lucasfilm Ltd. v. High Frontier, 622 F. Supp. 931 (D.D.C. 1985) 2, 8
Meyer, Colorado Secretary Of State, et al. v. Grant et al., 486 U.S. 414 (1988) 9
MGM-Pathe Communications Co. v. Pink Panther Patrol, 774 F.Supp. 869, 874 (S.D.N.Y. 1991) 8
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 4
National Van Lines v. Alfred E. Dean, trading under the firm name of National Transfer & Storage Co., 237 F.2d 688 (9th Cir. 1956) 11
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 4
R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992) 8, 9
Reno, Attorney General Of The United States, et al. v. American Civil Liberties Union et al., 96-511 (1997) 3, 10, 12
San Francisco Arts & Athletics, Inc., et al. v. United States Olympic Committee et al., 483 U.S. 522 (1987) 8
Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 4, 10
Tax Cap Committee v. Save Our Everglades, Inc., 933 F. Supp. 1077, 1080-81 (S.D. Fla. 1996) 2
Texas v. Johnson, 491 U.S. 397 ..... 3, 9, 12

TABLE OF AUTHORITIES — Continued

U.S. v. Eichman, et al., 496 U.S. 310 ..... 3, 7, 11, 12
United We Stand America, Inc., a D.C. Corporation v. United We Stand, America New York, Inc., a New York Corporation, 128 F.3d 86 (2nd Cir. 1997) 3, 4, 5, 8
Warner Brothers v. Gay Toys, 658 F.2d 76 (2nd Cir. 1981) 9
West Virginia State Board of Education et al. v. Barnette et al., 319 U.S. 624 (1943) 11
Whitney v. California, 274 U.S. 357 (1927) 5

STATUTES

15 U.S.C. §1114(1) 1, 2
15 U.S.C. §1117 ..... 1, 2
15 U.S.C. §1121 ..... 1, 2
15 U.S.C. §1125(a) 1,2
28 U.S.C. § 1254(1) 1
28 U.S.C. §1332(a) 1, 2
28 U.S.C. §1338(a) 1, 2
28 U.S.C. §1338(b) 1, 2

MISCELLANEOUS

The Unwritten War by Daniel Aaron, (University of Wisconsin Press, 1973) 6
Report on the Virginia Resolution 9

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported (Appendix A). The opinion of the district court is unreported (Appendix B).

JURISDICTION

The judgment of the court of appeals was entered on April 13, 1999. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution provides in relevant part that "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes". The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press". The relevant statutory provisions are 15 U.S.C. §1114(1), 15 U.S.C. §1117, 15 U.S.C. §1121 and 15 U.S.C. §1125(a) (Appendix J) and 28 U.S.C. §1332(a), 28 U.S.C. §1338(a) and 28 U.S.C. §1338(b) (Appendix K).

STATEMENT

Respondent's service mark comprising a depiction of the Confederate Battle Flag surrounded by elongated hexagons on each side within which are inscribed the words "Sons of Confederate Veterans" and the figures "1896" was registered on May 28, 1991. In March of 1997 Southern Defense Initiative Corporation, of which Petitioner was president, began publishing on their Internet website a logo depicting the Confederate Battle Flag surrounded by four elongated hexagons containing respectively the words "Southern Defense Initiative Corporation". The hexagons in both cases were similar to the outlines of the individual arms of the cross superimposed on the square flag in that each hexagonal figure contained four interior angles of 135 degrees and two interior angles of 90

degrees. The corporation used the logo in political advocacy, to inspire loyalty to the cause of states' rights and implementation of the Tenth Amendment. The Respondent, Sons of Confederate Veterans, filed a suit in the United States District Court alleging infringement under the Lanham Act and Common Law unfair competition. During pendency of the suit the name "Southern Defense Initiative Corporation" was changed to "Southern Initiative, Inc." and the Complaint was amended to reflect this change and to include Jimmy D. Giles personally as an additional Defendant. The District Court denied motions of Southern Defense Initiative Corporation to dismiss for lack of jurisdiction, for failure to state a claim for which relief can be granted and for summary judgment (Appendices G, H and I), all based on a claim that their actions were protected by the First Amendment. At trial a Jury found infringement and assessed damages of $1.00. The District Court enjoined Petitioner's logo, increased the damages to $3.00 and awarded Respondent Attorney's fees of $21,666.61. This Judgment was appealed to the United Sates Court of Appeals for the Fifth Circuit by both Southern Initiative, Inc. and Jimmy D. Giles. During the pendency of the appeal, the name of the Appellant corporation was changed to Confederate Initiative, Inc., the name under which the Judgment of the Circuit Court of Appeals was issued. Only Jimmy D. Giles individually is a party to this petition. The Judgment of the District Court was affirmed by the Circuit Court of Appeals on April 13, 1999 and the District Court awarded Respondent additional attorney's fees of $3,497.40.

The basis for federal jurisdiction in the Court of first instance was stated in the Complaint as 28 U.S.C. §1338(a), with reference to 15 U.S.C. §1114(1) and 1125(a) and under 15 U.S.C. §1121 and also under 28 U.S.C. §1338(b), 28 U.S.C. §1332(a) and 15 U.S.C. §1117. It is also stated that the matter in controversy arises under the laws of the United States.

REASONS FOR GRANTING THE PETITION

Petitioner contends that a United States Court of Appeals has decided important questions of Federal Law in a way that conflicts with the decisions of this Court, by affirming without comment the judgment below.[1] It is contended that the District Court judgment here undervalued the public interest in free and uninhibited debate in the political arena and

---

[1] The Circuit Court of Appeals in affirming the Judgment below is also in conflict with an Eleventh Circuit case, from the District Court for Southern Florida, *Tax Cap Committee v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1080-81 (S.D. Fla. 1996). The Judgment also conflicts with *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985).

overvalued the proprietary interest of holders of registered trademarks, and that the First Amendment precludes any role for government in refereeing the discussion of political affairs beyond that authorized by the traditional exceptions to protection under the First Amendment for the lewd, the obscene, the libelous and the insulting or fighting words. Subjecting those who have nothing to sell but ideas to regulation represents a departure down a slippery slope toward government control of politics instead of political control of gove nment, and is at odds with decisions of this Court upholding the right of each speaker to choose the method of expressing his or her political views which he or she deems most appropriate and effective. In this connection Petitioner refers particularly to *Texas v. Johnson*, 491 U.S. 397, *U.S. v. Eichman, et al.*, 496 U.S. 310, and *Reno, Attorney General Of The United States, et al. v. American Civil Liberties Union et al.*, 96-511 (1997). No compelling national interest has been cited to justify the suppression of political expression by the injunction forbidding publication of Petitioner's logo. Detailed objections to the Orders of the District Court, the affirmation of which is sought to be reviewed follow.

I. THE FIFTH CIRCUIT HAS DECIDED SEVERAL IMPORTANT FEDERAL QUESTIONS IN A WAY THAT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

A. The Fifth Circuit has by affirming the judgment below without comment putatively held that statutes which impinge upon the right of free political expression may be broadly interpreted regardless of the absence of a compelling national interest, contrary to decisions of this Court.

An Interpretation too Broad

The District Court's Opinion and Order of April 17, 1998 relies on *United We Stand America, Inc., a D.C. Corporation v. United We Stand, America New York, Inc., a New York Corporation*, 128 F.3d 86 (2nd Cir. 1997), approving the application of the Lanham Act in a suit between a national organization and its New York branch, both organizations being devoted to advancing the political aims of Ross Perot. In *United We Stand*, supra, the Court observed that "services" within the meaning of the Lanham Act has been broadly interpreted and cited various cases of home office—branch office disputes where the service mark involved was a word, phrase and/or symbol created and established in the public mind by

the parent organization. In contrast, Respondent's service mark depicts an artifact out of American history, known and revered by millions. Petitioner takes issue with such an interpretation insofar as his activities are concerned and points to several U.S. Supreme Court decisions where the operative word is *narrow*, not broad, when regulations which may impinge upon the right of free speech are involved.

Justice Brennan wrote in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), that "debate on public issues should be uninhibited, robust and wide open". He also wrote in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), "Because First Amendment freedoms need breathing space to survive, government may regulate there only with narrow specificity".

Capitol Square Review and Advisory Board et al. v. Pinette et al., 94-780 (1995), concerned a private display which the Ku Klux Klan desired to erect on a public square traditionally used as a public forum. The Supreme Court held that this was private religious speech as fully protected by the free speech clause as secular private expression. The Court further held that the Review Board could regulate the Klan's expressions there only if such restriction is necessary and narrowly drawn to serve a compelling state interest.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), it was held that absent "narrow, objective and definite standards", unbridled discretionary power vested in officials may operate as an unconstitutional prior restraint on First Amendment rights.

In *First National Bank of Boston et al. v. Bellotti, Attorney General of Massachusetts*, 435 U.S. 765 (1978), Justice Powell wrote "The asserted justification for the challenged statute cannot survive the exacting scrutiny required when the legislative prohibition is directed at speech itself and speech on a public issue".

B. The Fifth Circuit has by such affirmation putatively held that the First Amendment permits a role for Congress in regulating political debate to protect viewers of Internet websites from being deceived or confused as to the origin of political messages displayed thereon, contrary to decisions of this Court.

A Dubious Stamp of Approval

In *United We Stand*, supra, the Court also noted the useful role Lanham Act litigation may play in guaranteeing the *bona fides* of participants in political debate. Petitioner submits that a major purpose of the First Amendment was to deny government any power whatsoever to

regulate political expression, leaving it to the hearer to believe or disbelieve political rhetoric. Justice Brandies wrote in *Whitney v. California*, 274 U.S. 357 (1927), "The remedy for evil counsels is good ones". In *N.A.A.C.P. v. Button*, supra, Justice Brennan wrote "Constitutional protection does not turn on the truth, popularity or social utility of the ideas and beliefs that are offered," and in the same decision "erroneous statement is inevitable in free debate and it must be protected if freedoms of expression are to have the breathing room they need to survive". In *Barenblatt v. U.S.*, 360 U.S. 109 (1959), it is stated "It is the right to err politically that keeps us strong as a nation". Referring to exaggeration, vilification and even false statements, it is stated in *Cantwell et al. v. Connecticut*, 310 U.S. 296 (1940), "The people of this country have ordained in the light of history that * * * these liberties are in the long view essential to enlightened opinion and right conduct on the part of the citizens of a democracy. In *City of Houston, Texas v. Hill*, 482 U.S. 451 (1987), it is stated that "Statutes which make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application". In *John A. Boehner v. James A. McDermott*, Civ. No. 98-594 (TFH) DDC (1998 U.S. Dist. LEXIS 11509), the District Court wrote: "The First Amendment is largely blind to motives, however, and offers protection not only to the noble but also the ignoble".

C. The Fifth Circuit by such affirmation has putatively held that although Congress may not punish the burning of the American flag in protest against government policy, the same protester could be subjected to civil penalties under the Lanham Act for infringement of a registered service mark having a high degree of political significance which occurred incidentally in the process of political protest, contrary to decisions of this Court.

Identifying with the Heroic Past

Nevertheless, there are substantial grounds for distinguishing the present case from *United We Stand*, supra. There the Court held that the infringing party was not using the phrase "United We Stand" for an expressive purpose such as commentary, comedy, parody, news reporting or criticism, but instead as a means of associating itself with the political movement which sponsored the Ross Perot campaign. In this case Petitioner used the symbolism of the Confederate Battle Flag to associate its objectives with emotions stirred by the agony of the Civil War and the

repression which followed, and the ensuing struggle for states rights in the political arena. In the South, according to literary critic Daniel Aaron[2], "past and present are one" and the Confederate Battle Flag is a looming colossus driven deep into the psyche by memories of ancestral defeat, compared to which both SCV and Petitioner's organization are pygmies. Of the 70 million Southerners the combined membership of both organizations would represent a tiny fraction of one percent. Identification with the non-political SCV would only confuse those who might otherwise be persuaded to support states' rights in the political arena. If Petitioner had wished to hitch his wagon to a star he would not have chosen the obscure, self-neutered, non-political SCV.

The Opinion and Order dated April 17, 1998 also mentions *Dallas Cowboys Cheerleaders, Inc., v. Pussycat Cinema, Ltd. and Michael Zaffarano*, 604 F.2d 200 (2nd Cir. 1979), a case in which an infringement suit was upheld. There the Court held that the infringing uniforms "unquestionably bring to mind the Dallas Cowboys Cheerleaders". In this case Petitioner's logo unquestionably brought to mind the Civil War and the continuing struggle for states' rights, not the relatively obscure non-controversial SCV. This decision also states that the Lanham Act is content neutral and therefore does not arouse fears that trigger the application of constitutional prior restraint principles. Nothing could be farther from the truth in this case. There was only one Civil War and only one Confederate Battle Flag. To take this symbol or any of its identifying characteristics off the table in the process of political advocacy under the ambiguous standard of "confusingly similar" chills the expression of all the participants through uncertainty and the possibility of legal jeopardy in utilizing this indispensable symbol.

The Opinion and Order of April 17, 1998 also notes that Giles was aware of the SCV service mark when he designed the logo in question. He was also aware of (1) the usefulness of the device of enclosing his organization name in elongated hexagons to enhance the identification of his organization with the flag and all that it represents (2) the abridgment of his right to choose the method he deemed most appropriate and effective and the loss of effectiveness of communication which would result from congressional action depriving him and other political activists of this device and granting its exclusive use to the non-political SCV, and (3) the protection afforded to those who resort to unconventional and even provocative methods of expressing their political views by the flag burning

---

[2] *The Unwritten War* by Daniel Aaron. (University of Wisconsin Press, 1973).

decisions of the Supreme Court.[3] There is no constitutional right to have a registered service mark. There is no constitutional right to have the government guarantee the true identity of those who espouse political views in the public forum. But according to the holding in *U.S. v. Eichman, et al.*, supra, the right of each speaker to choose the method of expressing his or her political views which he or she considers most appropriate and effective enjoys First Amendment protection and occupies a high place in the balancing of interests which implementing the First Amendment requires. There the majority conceded (Footnote 6) that the government had a legitimate interest in preserving the flag's function as an incident of national sovereignty but nevertheless considered Eichman's right to choose burning it to express his opposition to government policies a superior interest. In the present case no compelling national interest is alleged to justify the restriction on the choice of method of expressing political ideas represented by the injunction. The District Court has in effect held the SCV's interest "to promote the interests of the Sons of Confederate Veterans" as shown by the registration certificate attached to the Complaint dated July 11, 1997, to be superior to the interest of the entire nation in protecting from desecration the flag under which whole generations of patriots have sacrificed their lives and the Circuit Court of Appeals has affirmed this ruling.

The Opinion and Order of April 17, 1998 also points out that a depiction of the Confederate Battle Flag surrounded by four elongated hexagons is distinct from the flag. This is literally true but symbolically misses the point. The device of enclosing one's organization name in hexagons symbolically wraps one's organization in the flag. The hexagons are not arbitrary symbols created by SCV, but are similar to and derived from the outlines of the separate arms of the cross superimposed on the square flag. The outline of the arms of the cross is as much an identifying characteristic as the cross itself or the stars. Application of a law granting exclusive use of this device to a non-political entity unconstitutionally deprives political advocates of this advantage. It is an impermissible government intervention in political debate in opposition to

---

[3] In *Ginger Rogers v Alberto Grimaldi, MGM/UA Entertainment Co., and PEA Produzione Europee Associate, S.R.L.*, 875 F.2d 994 (2nd Cir. 1989) it was held that the movie title "Ginger and Fred" contains no explicit indication that Rogers endorsed the film or had a role in its production; that the risk of misunderstanding, not engendered by any overt claim in the title is so far outweighed by the interest in artistic freedom as to preclude the application of the Lanham Act. And the sponsorship and endorsement claim raised no genuine issue that required submission to a jury. The logo in question here made no explicit reference to the SCV, but was labeled in plain words "Southern Defense Initiative Corporation".

the cause of states' rights and local autonomy. See *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992). In that decision Justice Scalia wrote of a statute calculated to intervene in debate, sending a message by regulating fighting words connected with certain views while ignoring those having an opposite tendency: "St. Paul has no such authority to license one side of a debate to fight freestyle while requiring the other to follow Marquis of Queensbury rules".

The Opinion and Order of April 17, 1998 quotes from *MGM-Pathe Communications Co. v. Pink Panther Patrol*, 774 F.Supp. 869, 874 (S.D.N.Y. 1991), "The seriousness and virtue of the cause does not confer rights to the trademark of another". The question here is whether or not the trademark right exists, insofar as Petitioner's activities are concerned. Pink Panther Patrol was piggybacking on a trademark whose value was created by MGM-Pathe through the expenditure of millions. The value of the symbol depicted in Respondent's service mark was an established fact prior to creation of the mark as the consequence of historical events and was assigned to Respondent as a gift for a nominal registration fee. The Constitution forbids the creation of a right by Congress which abridges the freedom of political expression by others.[4]

In *United We Stand*, supra, the Court made one exception when subjecting political advocacy groups to Lanham Act Regulation. It approved the holding, though not the rationale for *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985). There the District Court for the District of Columbia held that "purveying points of view is not a service" contemplated by the Lanham Act. The creator of the *Star Wars* mark sought to prevent public interest groups from using the term *Star Wars* to identify the Reagan Administration Strategic Defense Initiative. The District Court dismissed the Complaint, saying Defendant's are not selling anything but ideas.

The ground on which the *United We Stand* Court, supra, would exempt High Frontier from the Lanham Act regulation is that they were not using the mark as a source identifier but as a part of a message whose meaning depended on reference to Plaintiff's product. Here, the source identifier of one who advocates states' rights is the Civil War, not the obscure non-political SCV. The product, to speak in trademark law terms, of both parties is the Civil War. The Confederate Battle Flag means pillared mansions, cotton fields, shock of war, total defeat, humiliation,

---

[4] In *San Francisco Arts & Athletics, Inc., et al. v. United States Olympic Committee et al.*, 483 U.S. 522 (1987), the Court stated "when a word [or symbol] acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]".

repression and resentment. To deprive Petitioner of use of the flag or any of its identifying characteristics is to abridge his freedom to evoke these images and limit the effectiveness of his communication. Respondent's service mark depicts an object which is a metaphor for the struggle for states' rights and an inseparable part of the message Petitioner is trying to deliver just as "Star Wars" delivered the derisive message of High Frontier concerning the Reagan missile defense proposals.

The Confederate Battle Flag belongs to the nation and has an aura and an influence which Congress is forbidden by the First Amendment to grant as a monopoly to any private organization, not the flag itself or any of its identifying characteristics such as its cross, its thirteen stars or its hexagons. Depiction of the flag reinforced by hexagonal symbols repeating the outline of the arms of the cross is protected symbolic speech.

D. The Fifth Circuit has by such affirmation putatively held that political speech is entitled to no greater degree of First Amendment protection than commercial speech, contrary to decisions of this Court.

Political Speech v. Commercial Speech

The Opinion and Order of April 17, 1998 takes note of SCV's assertion that the Confederate Battle Flag can be a part of a trademark, citing *Warner Brothers v. Gay Toys*, 658 F.2d 76 (2nd Cir. 1981). That case, unlike the case considered here, involved no abridgment of the freedom of political expression. Justice Stevens wrote in *R.A.V. v. City of St. Paul, Minnesota*, supra, that when the government regulates political speech First Amendment protection is at its zenith, citing *Meyer, Colorado Secretary Of State, et al. v. Grant et al.*, 486 U.S. 414 (1988). And in *Texas v. Johnson*, supra, the Court stated "Johnson was not prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values". James Madison, author of the First Amendment, when he said the right of freedom of speech and the press was the only effectual guardian of all other rights was referring to political speech, or, as he said, "The right to freely examine public characters and measures, and of free communication among the people thereon".[5]

---

[5] *Report on the Virginia Resolution.*

E. The Fifth Circuit has by such affirmation putatively held that an imprecisely defined category of methods of political expression may be subject to prior restraint by injunction covering all such methods which may be deemed to be "confusingly similar" to a certain service mark by Judges or Jurors in future enforcement actions. Although "confusingly similar" has no fixed determinate meaning but is subject to individual judgment of the persons involved. Narrow guidelines and compelling national interest required by the decisions of this Court for suppression of political expression are absent in this case.

Prior Restraint by Injunction

The injunction forbidding use of any symbol which may seem to a future judge or jury confusingly similar to the SCV service mark is a continuing violation of constitutional rights, chilling political expression by Petitioner and the public as well. "Confusingly similar" has no fixed and determinate meaning, and is thus an unconstitutionally vague standard, inviting judges and juries to speculate as to how carefully consumers examine the Internet images on their computer screens, a medium with which many jurors are unfamiliar.[6] It is particularly inapt when applied to political controversy, an area never contemplated by the authors of the phrase. The absence of ascertainable standards invites the unbridled discretion condemned in *Shuttlesworth v. City of Birmingham*, supra. In *Armstrong Cork Company and Armstrong World Industries, Inc., v. World Carpets, Inc., et al.*, 597 F.2d 496 (5th Cir. 1979), the Court characterized trademark law as "an exotic and esoteric realm" and the legal standard as "confusion reigns". The courts have attempted to clear up the confusion by various rules having to do with "average consumers". One formula leaves no room for doubt. On January 29, 1998 in a response entitled Memorandum of Authorities in opposition to Defendant's Motion for Summary Judgment and in support of Plaintiff's cross Motion for Partial Summary Judgment SCV *informed the Court that if the dominant portions*

---

[6] Judge Buckwalter of the Three-Judge District Court which initially enjoined certain sections of *The Communications Decency Act* (See *Reno, Attorney General Of The United States, et al. v. American Civil Liberties Union et al.*, supra, believed the unique nature of the Internet aggravated the vagueness of the statute. Judge Dalzell of the same Court said his review of special attributes of Internet communication convinced him that * * * "as the most participatory form of mass speech yet developed" the Internet is entitled to "the highest protection from government intrusion".

of two marks are the same confusion is likely, citing *Country Floors, Inc. v. A Partnership Composed of Charley Gepner and Gary Ford, d/b/a Country Tiles*, 930 F.2d 1056 (3rd Cir. 1991) and *National Van Lines v. Alfred E. Dean, trading under the firm name of National Transfer & Storage Co.*, 237 F.2d 688 (9th Cir. 1956). This would preclude any effective use by Petitioner of the primary symbol for states' rights. In *West Virginia State Board of Education et al. v. Barnette et al.*, 319 U.S. 624 (1943), the Court wrote "symbolism is a primitive but effective way of communicating ideas. The use of a flag... is a shortcut from mind to mind. Contenders in the marketplace of ideas seek to knit the loyalty of their followers to a flag or banner". Justice Stevens wrote in *U.S. v. Eichman, et al.*, supra, "The freedom of expression protected by the First Amendment embraces not only the freedom to communicate particular ideas but also the right to communicate them effectively". The uncertainty inherent in the term "confusingly similar" poses a continuing threat to the ability of Petitioner and all others to communicate ideas and emotions connected to the Confederate Battle Flag effectively. The Court said in *Bantam Books, Inc. et al. v. Sullivan et al.*, 372 U.S. 58 (1963), "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its validity". The hexagons are not arbitrary symbols, but are part and parcel of the flag, reflecting back and resonating with the outlines of the separate arms of the cross, enhancing the sense of identification of the organization whose name is enclosed therein with the flag and the emotions that it arouses. The reach of the First Amendment was defined by Justice Stevens (In Dissent) in *U.S. v. Eichman, et al.*, supra, as "the right of each speaker to choose the method of expressing his or her political ideas which he or she deems most appropriate and effective". In that case the majority held this interest outweighed the interest of our society in protecting the symbol of national sovereignty from desecration. The District Court has ruled in effect and the Circuit Court of Appeals has affirmed, that even in the absence of a compelling national interest the private interest of SCV in a privilege granted by the Congress upon application and payment of a nominal fee outweighs the interest of all of us in both the integrity of the flag under which generations have sacrificed their lives for freedom and that freedom itself which James Madison said depends upon the right of free speech, the only effectual guardian of every other right.

F. The Fifth Circuit has by such affirmation putatively held that certain methods of political expression may be suppressed, as long as alternate channels of communication are available, contrary to decisions of this Court.

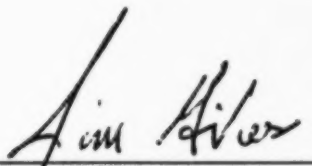
Alternative Methods of Expression

The Opinion and Order of April 17, 1998 states that property rights need not yield to First Amendment rights where adequate alternative avenues of communication exist. This idea runs into a stone wall in *Reno, Attorney General Of The United States, et al. v. American Civil Liberties Union et al.*, supra, where Justice Stevens, referring to the government's contention that the Communications Decency Act is constitutional because it leaves open ample alternative channels, wrote "The government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books". As was held in *U.S. v. Eichman, et al.*, supra, the choice of methods of political expression belongs to each speaker, not to Congress, the Courts or plaintiffs in trademark cases. In *Texas v. Johnson*, supra, Chief Justice Rhenquist wrote that the Texas Statue "deprived Johnson of only one rather inarticulate symbolic form of protest * * * and left him with a full panoply of other symbols and every conceivable form of verbal expression", yet the majority of the Court upheld his choice to burn the flag. In relying on availability of alternative methods of expression the Opinion and Order of April 17, 1998, is clearly in conflict with the decisions of this Court.

CONCLUSION

Petitioner prays that this Honorable Court grant certiorari to insure the integrity of the First Amendment and full implementation of the broad spectrum of protection which its author intended and past decisions of this Court have upheld. If Madison could speak to us today Petitioner thinks he would urge that the freedom provided in the First Constitutional Amendment ratified by the states not be allowed to be whittled away to serve any private interest.

Respectively Submitted.



JIMMY D. GILES
Pro Se
2000 Nathan Bedford Forrest Complex
Jackson, MS 39208-9421
(601) 933-2000

July 1999

APPENDIX A
Opinion of the Court Of Appeals

U.S. COURT OF APPEALS
FILED
APRIL 13 1999
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60660
Summary Calendar

SONS OF CONFEDERATE VETERANS, INC.,
Plaintiff-Appellee,

VERSUS

CONFEDERATE INITIATIVE, INC. and JIMMY D. GILES,
Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Mississippi
Jackson Division

(3:97-CV-534-BN)

Before DAVIS, DUHE and PARKER, Circuit Judges.

PER CURIAM:*

Defendants-Appellants, Confederate Initiative, Inc. and Jimmy D. Giles ("Defendants"), appeal the judgment for Plaintiff Appellee, Sons of Confederate Veterans, Inc. ("Plaintiff"), the dismissal of their counterclaim against Plaintiff and the $21,666.61 in attorney fees awarded to Plaintiff. We affirm.

Defendants did not file a post-trial motion for judgment or new trial based on insufficiency of the evidence. Further, Defendant did not order a transcript of the trial proceedings. Therefore, Defendants have failed to preserve any factual issue for determination in this appeal.

Having reviewed the briefs, the portions of the record before us and the applicable law, we discern no reversible error. We therefore affirm the dismissal of Defendants' counterclaim, the final judgment for Plaintiff and the attorney fee award.

Because this disposition of the merits moots Plaintiff's motions to strike Defendants' briefs, we deny those motions as moot. Defendants' motion to compel service of appellate documents at their street address is likewise denied as moot.

AFFIRMED. MOTIONS DENIED.

Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B
Opinion of the District Court

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
AUG 7 1998
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS.

SOUTHERN INITIATIVE, INC. AND
JIMMY D. GILES DEFENDANTS

JUDGMENT

On July 22, 1998, a jury composed of Noel W. Hollyfield, Foreperson, and six other jurors return its Verdict by Special Interrogatories as follows:

1. Do you find that Southern Initiative, Inc. used in commerce a colorable imitation of Plaintiff's registered Service Mark in connection with the distribution or advertising of any services which is likely to cause confusion?

   x Yes

2. Do you find that Southern Initiative, Inc., in connection with its services, used in commerce a symbol which is likely to cause confusion as to the affiliation, connection or association of the Defendant Southern Initiative, Inc. with the Plaintiff, or is likely to cause confusion as between Defendant Southern Initiative, Inc. and Plaintiff as to the origin, sponsorship or approval of the services of Defendant Southern Initiative, Inc.?

   x Yes

(If your answers to Questions Nos. 1 and 2 are "No," do not answer question No. 3. The Court will enter a judgement for the Defendants.)

3. If you have answered questions Nos. 1 or 2 or both "Yes," what do you find was the amount of Defendant's profits during the period of time that Defendants infringed upon Plaintiff's Service Mark?

$ One Dollar ($1.00)

In accordance with the Verdict, the Court hereby finds that there as been an infringement by the Defendants on the Service Mark of the Plaintiff. The Court further finds, in the exercise of its equitable powers, that the infringement was willful and accordingly that the damages should be trebled from $1.00 to $3.00 in accordance with 15 U.S.C.A S 1117(a). Judgement is hereby rendered in favor of Sons of Confederate Veterans, Inc. against Southern Initiative and Jimmy D. Giles in the amount of Three Dollars ($3.00), together with interest thereon at the rate on federal judgments of 5.375% per annum until paid in full and together with costs.

Further, in the exercise of its equitable powers, the Court makes permanent the preliminary injunction entered by the Court on January 8, 1998. Defendants Southern Initiative, Inc. and Jimmy D. Giles, and any and all agents, employees, operatives and affiliates thereof shall refrain from an use of any logo that is confusingly similar to the registered service mark of Plaintiff, Sons of Confederate Veterans, Inc., and, specifically, may not distribute the Voter Guide in any manner whatsoever.

SO ORDERED AND ADJUDGED this the 7th day of August, 1998.

"s/ William H. Barbour, Jr."
UNITED STATES DISTRICT JUDGE

APPENDIX C
Court of Appeals Order Granting Respondent an Attorney Fee Award in the Amount of $3,497.40

U.S. COURT OF APPEALS
FILED
MAY 26 1999
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-60660

SONS OF CONFEDERATE VETERANS, INC.,
Plaintiff-Appellee,

VERSUS

CONFEDERATE INITIATIVE, INC. and JIMMY D. GILES,
Defendants-Appellants.

Appeal from the United States District Court
For the Southern District of Mississippi
Jackson Division

(3:97-CV-534-BN)

Before DAVIS, DUHE and PARKER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion for attorney's fees pursuant to Local Rule 47.8 and 15 U.S.C. Sect. 1117 is "granted in the amount of $3,497.40."

APPENDIX D
District Court Order Granting Respondent an Attorney Fee Award in the Amount of $21,666.61

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
SEPT 28 1998
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS. CIVIL ACTION NO. 3:97CV534BN

SOUTHERN DEFENSE INITIATIVE CORPORATION DEFENDANT

ORDER

This cause is before the Court on Plaintiff's Motion for Judgment as a Matter of Law regarding Profits, or, Alternatively, Motion for Additur, or, Alternatively, Motion for New Trial on Issue of Profits and Motion to Alter or Amend Judgment and Plaintiff's Motion for Attorney's Fees. Having considered the Motions, Responses, supporting and opposing memoranda, and all attachments to each, the Court finds that the Motion for Attorneys Fees should be granted in part and denied in part, and the remaining Motion is not well taken and should be denied.

I. Motion for Judgment as a Matter of Law regarding Profits, or, Alternatively, Motion for Additur, or, Alternatively, Motion for New Trial on Issue of Profits and Motion to Alter or Amend Judgment

Plaintiff argues that it is entitled to $73,768.86 in damages which consists of three times the amount Plaintiff asserts is profit Defendant made as a result of using Plaintiff's service mark. However, the jury found that Defendant was entitled to damages in the amount of $1.00. The Court, in its discretion, awarded treble damages in the amount of $3.00. The

Court finds that Plaintiff is not entitled to an additur or a new trial on damages and that the award of the jury will stand in this case.

II. Motion for Attorney's Fees

Under 15 U.S.C. § 1117, the Court is directed to award a reasonable attorney's fee if the jury finds that Defendant has used Plaintiff's service mark in violation of the Lanham Act. The proper way to calculate a reasonable attorneys' fee under a statutory attorney's fee provision is to use the "lodestar method." The applicant for a fee award bears the burden of proving that the number of hours representing the labor required, as well as the hourly rate for which compensation is requested, is reasonable. See Riley v. City of Jackson, 2 F.Supp.2d 864, 872 (S.D.Miss. 1997) (citing Hensley v. Eckerhart, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)).

According to the "lodestar method," the Court multiplies the number of hours worked by the hourly rate of the attorney or paralegal working on the case. Blanchard v. Bergeron, 489 U.S. 87, 94 95 (1989) (adopt[ing] the lodestar approach as the centerpiece of attorney's fee awards"). See also Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 961 (5th Cir. 1993) (requiring the court to consider only the hours spent working on the successful claims). A reasonable hourly rate for services is based on the customary fee for similar work in the community and the experience and ability of counsel. Shipes v. Trinity Industries, 987 F.2d 311, 319 (5th Cir. 1993).

Regarding what constitutes a reasonable fee, the United States Court of Appeals for the Fifth Circuit has set forth twelve factors which should be considered to judge the reasonableness of an attorney's fee. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 719 (5th Cir. 1974). The "Johnson factors," as they have come to be known, are also contained in Rule 15(b) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi. Those factors are as follows:

(A) The time and labor required, which shall include an itemized statement of all time expended by counsel, together with a brief description of the services performed during each period itemized.

(B) The novelty and difficulty of the questions.

(C) The skill requisite to perform the legal services properly.

(D) The preclusion of other employment by the attorney due to acceptance of the case.
(E) The customary fee.
(F) Whether the fee is fixed or contingent.
(G) Time limitations imposed by the client or the circumstances.
(H) The amount involved and the results obtained.
(I) The experience, reputation, and ability of the attorneys.
(J) The "undesirability" of the case.
(K) The nature and length of the professional relationship with the client.
(L) Awards in similar cases.

Local Rule 15(b)(3) of the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi. As noted by the Blanchard Court, "[t]he Johnson factors may be relevant in adjusting the lodestar amount but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." Blanchard, 489 U.S. at 94.

Plaintiff asserts that it is entitled to attorney's fees in the amount of $25,420.50 (representing an hourly rate of $95 per hour for Plaintiff's counsel Michael Barefield times 319.5 hours) and expenses in the amount of $2,639.61, for a total of $28,060.11. The Court notes that the 319.5 hours spent on the case by Barefield was unreasonable in that consultation with the Court could have eliminated the necessity for many of the numerous motions filed in this case,[7] that a reasonable number of hours would have been 200 hours, and that, considering the lodestar method, Johnson factors, and considering prevailing community standards for attorneys of similar experience in similar cases, a reasonable fee would be $19,000.00 ($95 times 200). In addition, Plaintiff is entitled to a fee of $27.00 for the work of his paralegal, and expenses in the amount of $2639.61, for a total of $21,666.61. For this reason, the Court finds that Plaintiff is entitled to an attorney fee award in the amount of $21,666.61.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Judgment as a Matter of Law regarding Profits, or, Alternatively, Motion for Additur, or, Alternatively, Motion for New Trial on Issue of Profits and Motion to Alter or Amend Judgment [212-1] is denied.

---

[7] The Court has taken into consideration the fact that Giles has proceeded pro se and has been a surprisingly industrious litigator.

IT IS FURTHER ORDERED that Plaintiff's Motion for Attorney's Fees [211-1] is granted in part and denied in part and Plaintiff is awarded attorney's fees and expenses totaling $21,666.61.

SO ORDERED this the 28th day of September, 1998.

"s/ William H. Barbour, Jr."
UNITED STATES DISTRICT JUDGE

APPENDIX E
District Court Opinion and Order Denying
Motion to Dismiss for Lack of Jurisdiction

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
APR 6 1998
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS. CIVIL ACTION NO. 3:97CV534BN

SOUTHERN DEFENSE INITIATIVE CORPORATION DEFENDANT

ORDER

This cause is before the Court on the Motion for Dismissal for Lack of Jurisdiction ("Motion to Dismiss") filed by Defendant Southern Defense Initiative ("Southern") against Plaintiff Sons of the Confederate Veterans, Inc. ("Sons of Confederate"). Having considered the Motion to Dismiss, Response, Rebuttal, all attachments to each and supporting and opposing memoranda, the Court finds that the Motion is not well taken and should be denied.

Plaintiff brought this action for trademark infringement under 15 U.S.C. § 1114(l) and 15 U.S.C. 1125(a). Defendant alleges in its Motion to Dismiss that the Court does not have subject matter jurisdiction over Plaintiff's claims because, Defendant alleges, Southern does not engage in the sale, distribution or advertising of goods or services.

Defendant's argument is completely without merit, and Defendant's Motion to Dismiss is frivolous. Defendant may dispute the merits of Plaintiff's claims against it, but this does not remove the action from the jurisdiction of this Court. Defendant's Motion to Dismiss is denied.

IT IS, THEREFORE ORDERED that Defendant's Motion to Dismiss [32-1] should be and hereby is denied.

SO ORDERED this the 6th day of April, 1998.

"s/ William H. Barbour, Jr."
UNITED STATES DISTRICT JUDGE

APPENDIX F
District Court Opinion and Order Denying Motion for Judgment on the Pleadings and Motion for Summary Judgment

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
APR 17 1998
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS. CIVIL ACTION NO. 3:97CV534BN

SOUTHERN DEFENSE INITIATIVE CORPORATION DEFENDANT

OPINION AND ORDER

This cause is before the Court on the Motion for Judgment on the Pleadings and Motion for Summary Judgment filed by Defendant Southern Defense Initiative Corporation ("Southern") and the Cross Motion for Partial Summary Judgment filed by Plaintiff Sons of Confederate Veterans, Inc. ("SCV"). Having considered the Motions, Responses, Rebuttals, all attachments to each, and supporting and opposing memoranda, the Court finds the Motion for Judgment on the Pleadings and Motion for Summary Judgment filed by Defendant are not well taken and should be denied, and the Cross Motion for Partial Summary Judgment is not well taken and should be denied.

I. Factual Background and Procedural History

This case involves an action for trademark infringement. Plaintiff SCV is a non profit corporation professedly dedicated to preserving the history and heritage of the South, Confederate Veterans and the "War for Southern Independence for the Confederate States of America." Members of SCV are individuals whose ancestors fought in the Civil War. Plaintiff

owns a Service Mark[8], United States Certificate of Registration No. 1646404, which is a depiction of a Confederate Battle Flag bordered by 4 elongated hexagons. Within each hexagon, the words "Sons of," "Confederate," "Veterans" and "1896" respectively are written.

Southern is a self described "membership organization committed to re-writing history, the false history which paints our heroic ancestors who unsheathed the sword in defense of their homes, their wives and daughters, of civilization as they knew it, as cynical mercenaries willing to sacrifice all in a last ditch struggle to maintain the slave system."

Southern maintains a web page on the Internet and uses its web page for political advocacy. Southern solicits memberships and asks readers to contribute money to support the political causes espoused in the web site. Southern is a for profit organization. Contributions, donations and profits are used to pay bills and personal income for James Giles, the President and sole director of Southern.

Southern has a logo which it displays on its web page and at gun shows where Southern solicits memberships. Southern's logo is a depiction of a Confederate Battle Flag bordered by 4 elongated hexagons. Within each hexagon, the words "Southern," "Defense," "Initiative" and "Corporation" respectively are written.

Giles testified in his deposition that at the time he was designing the logo for Southern, he was aware of the SCV service mark. He also testified that at that time, he knew that the logo he was designing was identical to the SCV service mark except for the words contained in the hexagons. At least two individuals, Richard Forte and Donald Parker, who have seen the Southern logo, confused the logo with the service mark of SCV because of the similarity of the two marks.

On May 28, 1997, Allen Trapp, an attorney acting on behalf of SCV, wrote Southern a letter protesting Southern's use of its logo because of the similarity of the logo to SCV's service mark. Southern continued to use the logo. For this reason, SCV filed a Complaint for an injunction and damages under 15 U.S.C. § 1114(l) and 15 U.S.C. § 1125(a) (collectively, the "Lanham Act") against Southern for infringement of trademark.

On January 6, 1998, the Court granted a preliminary injunction in favor of Plaintiff SCV enjoining Defendant Southern from the use of its logo or any logo that was confusingly similar to the registered service mark of Plaintiff. The Court found that although the service mark was not

---

[8] The Certificate of Registration for the service mark of SCV has presently lapsed because SCV failed to file a Certificate of Use for the service mark. SCV has filed for a new Certificate of Use and currently is waiting for the service mark to be reinstated.

properly registered at the time, that such registration was not required for the service mark to be protected under the Lanham Act.

Defendant filed a Motion for Judgment on the Pleadings and, several days later, a Motion for Summary Judgment. Plaintiff filed its Response to Defendant's motions and a Cross Motion for Partial Summary Judgment.

II. Legal Standard

Although Defendant filed its Motion for Judgment on the Pleadings and Motion for Summary Judgment separately, Defendant raises related issues in each of the motions, and for this reason, the Court will consider the motions as if Defendant had filed a single motion: a motion to dismiss on the pleadings, or in the alternative, for summary judgment. Although motions to dismiss and motions for summary judgment are interrelated and are often asserted in the alternative, there are differences in the legal standards applied under the two motions. The purpose of a Rule 12(b)(6) motion to dismiss is to test the statement of the claim for relief as set out in the complaint. See Murray v. Amoco Oil Co., 539 F.2d 1385, 1387 (5th Cir. 1976). The motion may be granted "'only if it appears that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" Barrientos v. Reliance Standard Life Ins. Co., 911 F.2d 1115, 1116 (5th Cir. 1990) (quoting Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986)). Thus, in considering a motion to dismiss, the court's inquiry is limited to the contents of the complaint. Jackson v. Procunier, 789 F.2d 307, 309 n.4 (5th Cir. 1986).

In contrast, a motion for summary judgment goes beyond the pleadings and tests the sufficiency of the evidence a party can produce in support of those issues on which it will bear the burden of proof at trial. Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The United States Supreme Court has held that this language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) ; see also Moore v. Mississippi Valley State Univ., 871 F.2d 545, 549 (5th Cir.

1989); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988).

The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The movant need not, however, support the motion with materials that negate the opponent's claim. Id. As to issues on which the non-moving party has the burden of proof at trial, the moving party need only point to portions of the record that demonstrate an absence of evidence to support the non moving party's claim. Id. at 323324. The non moving party must then go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Id. at 324.

Summary judgment can be granted only if everything in the record demonstrates that no genuine issue of material fact exists. The district court, therefore, must not "resolve factual disputes by weighing conflicting evidence, since it is the province of the jury to assess the probative value of the evidence." Kennett-Murray Corp. v. Bone, 622 F.2d 887, 892 (5th Cir. 1980). Summary judgment is improper where the court merely believes it unlikely that the non moving party will prevail at trial. National Screen Serv. Corp. v. Poster Exchange, Inc., 305 F.2d 647, 651 (5th Cir. 1962).

Because the parties have submitted and the Court has considered materials outside of the pleadings, the Court will treat Defendant's motion as a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12 (b) (6) ; Murphy v. Inexco Oil Co., 611 F. 2d S70, S73 (5th Cir. 1980); Young v. Biggers, 938 F.2d 565, 568 (5th Cir. 1991).

III. Analysis

A. Defendant's Motion for Summary Judgment

1. Applicability of Lanham Act

With regard to trademark infringement, the Lanham Act provides:

> § 1114. Remedies; infringement; innocent infringement by printers and publishers.
>
> (1) Any person who shall, without the consent of the registrant

(a) Use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive, shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

15 U.S.C. §1114 (1998).

§ 1125. False designations of origin, false descriptions, and dilution forbidden.

(a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term name, symbol, or device, or any combination thereof, or any false designation or origin, false or misleading description of fact, or false or misleading representation of fact, which

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125 (1998).

Defendant argues there are no material facts in dispute in this action. Defendant contends that the Lanham Act does not apply to Defendant or any of its activities because Defendant is not engaged in the sale or distribution of goods or services but is instead engaged solely in the advocacy of ideas, support or opposition to Political candidates and boycotting commercial firms for political reasons. Plaintiff asserts that the Lanham Act is as applicable to public service and non profit organizations as it is to commercial companies.

In United We Stand America, Inc. v. United We Stand, America New York, 128 F.3d 86 (2d Cir. 1997), the Second Circuit Court of Appeals directly addressed this issue. In that case, a political organization sued another political organization for infringement of the service mark "United We Stand America." The defendant argued that its political activities, in connection with which it used the disputed service mark, were not "services" within the meaning of the Lanham Act and that its conduct was not within the Act's prohibition.

The court noted that the term "services" has been interpreted broadly. United, 128 F.3d at 89. The court stated that "the right to enjoin infringement of a trade or service mark ,is as available to public service organizations as to merchants and manufacturers." Id. (citing N.A.A.C.P. v. N.A.A.C.P. Legal Defense and Educ. Fund, 559 F. Supp. 1337, 1342 (D.D.C. 1983), rev'd on other grounds, 753 F.2d 131 (D.C.Cir.), cert. denied, 472 U.S. 1021 (1985)). The Court further stated, "[R]etention of a distinct identity by a non profit organization that sells no goods is just as important as it is to a commercial company." United, 128 F.3d at 89. The defendant in United was a political organization incorporated to raise money and support the presidential candidacy of Ross Perot. With regard to the defendant organization, the court stated:

> A political organization that adopts a platform and endorses candidates under a trade name performs the valuable service of communicating to voters that it has

> determined that the election of those candidates would be beneficial to the objectives of the organization. Thus voters who support those objectives can support the endorsed candidates with some confidence that doing so will advance the voters' objectives.

Id. at 90. For this reason, the court held that the political activities of the defendant constituted "services" under the Lanham Act. Id. at 92.

Like the organizations discussed in United, Southern is a political organization which has adopted a platform and endorses candidates. Additionally, Southern is a for profit organization which solicits donations. For these reasons, the Lanham Act applies to Southern.

2. Falsity of Representations and Allegations

Defendant argues that Plaintiff's Complaint should be dismissed because the Complaint alleges that Defendant falsely represents the origin and sponsorship of its publications in violation of 15 U.S. C. § 1125 (a), while the logo of Defendant does not falsely represent the origin of any publication as it is identified as such in plain words. Additionally, Defendant argues that Plaintiff's Complaint should be dismissed because the Complaint alleges that Defendant has created through false allegations and trade an appearance that Plaintiff endorsed or sponsored Defendant, but the Complaint does not cite any allegations of Defendant which are claimed to be false.

District courts addressing § 1125 (a) have held that a false reference to the origin of a work, or a reference which, while not literally false, is misleading or likely to confuse, may form the basis of a claim under section 43 (a) of the Lanham Act. King v. Innovation Books, 976 F.2d 824, 828 29 (2d Cir. 1992). See Savin Corp. v. National Toner Warehouse, Inc., 528 F. Supp. 636, 643 (N.D.Ga. 1981) (even if technically true, a representation that may tend to create a false impression is a violation of the Act). Plaintiff alleges that in using a logo confusingly similar to Plaintiff's logo, Defendant has created a false impression that Plaintiff has endorsed or sponsored Defendant and that Defendant has falsely represented the origin of its publication. Plaintiff does not have to allege that Defendant has made a literally false allegation. The Court finds that Plaintiff has stated a claim against Defendant for violation of 15 U.S.C. 1125(a).

3. Actual and Punitive Damages

Defendant argues that the injuries alleged by Plaintiff are "theoretical" and that Plaintiff has not alleged in its Complaint any instance where anyone was actually confused by the logo of Defendant. Defendant additionally argues that Plaintiff is not entitled to punitive damages because Defendant was under no duty to refrain from the exercise of its constitutional rights.

Defendant is incorrect. Plaintiff has stated a cause of action against Defendant for violation of the Lanham Act. Under the Lanham Act, the test of trademark or service mark infringement is "likelihood" of confusion. Evidence of actual confusion is unnecessary. Sun Fun Products, Inc. v. Suntan Research & Development, Inc., 656 F.2d 186, 191 (5th Cir. 1981). In some circumstances, punitive damages are appropriate for violations of the Lanham Act. H&R Industries, Inc. v. Kirshner, 899 F. Supp. 995, 1011 12 (E.D.N.Y. 1995). Because the existence of damages is a disputed issue of material fact, summary judgment is not appropriate on this issue.

4. Public Domain

Defendant notes that both its logo and the service mark of Plaintiff consist of elongated hexagons surrounding the Confederate Battle Flag. Defendant asserts that hexagons, like the Confederate Battle Flag, are in the public domain and are part and parcel of the flag, an inseparable element of its imagery and symbolism. The Court presumes that since Defendant contends that its logo is in the public domain, Defendant is arguing that Defendant cannot be liable for trademark infringement based upon the logo.

Plaintiff argues that the Confederate Battle Flag can be incorporated into a mark and legally registered as a trademark by the U.S. Patent and Trademark Office. In support of this assertion, Plaintiff cites Warner Bros. v. Gay Toys, 658 F.2d 76 (2d Cir. 1981), in which the Second Circuit upheld the trademark of a 1969 Dodge Charger with a Confederate Battle Flag emblem, with the numeral 01 on the doors, as the proprietary mark of Warner Brothers based upon its television series, "The Dukes of Hazard."

A person may not bring a claim under the Lanham Act if, absent a legally protected trademark, patent or copyright, the subject of the claim is in the public domain. Kienzle v. Capital Cities/American Broadcasting Company, Inc., 774 F. Supp. 432, 438 39 (E.D.Mich. 1991). In this case, the subject of Plaintiff's claim, the logo with the Confederate Battle Flag surrounded by four elongated hexagons, is a legally protected service mark. Plaintiff registered the mark with the U.S. Patent and Trademark

Office. Even though the registration lapsed, the service mark is still legally protected as the distinct mark of SCV. See Marathon Manufacturing Co. v. Enerlite Products Corp., 767 F.2d 214, 217 (5th Cir. 1988) (holding that same facts which would support an action for trademark infringement would also support an action for unfair competition). While the Confederate Battle Flag may well be in the public domain, a depiction of the Confederate Battle Flag surrounded by four elongated hexagons is not in the public domain because such a depiction is distinct and unique from the flag itself. For this reason, the Court finds that the Plaintiff's service mark is not in the public domain.

5. Application of First Amendment

Defendant argues that the power of Congress to regulate interstate commerce does not extend to regulation of political speech, allocation of particular areas of discussion, particular speakers or the exclusive use of certain modes of expression by holders of recognized marks. Defendant cites the First Amendment as authority for his right to uninhibited expression of his political views.

Generally, the First Amendment does not protect infringement of trademark. See Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 206 (2d Cir. 1979) (trademark is in nature of property right and as such it need not yield to exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist). The fact that Defendant is engaged in political speech does not remove the Plaintiff's service mark from protection under the Lanham Act. See MGM Pathe Communications Co. v. Pink Panther Patrol, 774 F. Supp. 869, 877 (S.D.N.Y. 1991) (court held that there was no legal support for defendant's argument that because defendant was engaged in political speech, defendant was less subject to trademark laws, stating "[t]he seriousness and virtue of a cause do not confer any right to the use of the trademark of another"). The Court finds that Defendant does not have a First Amendment right to express his political views when his doing so violates the trademark protection afforded to Plaintiff under the Lanham Act.

Defendant is not entitled to judgment as a matter of law. The Court finds that Defendant's Motion for Summary Judgment is not well taken and is denied.

B. Plaintiff's Cross Motion for Partial Summary Judgment

Plaintiff argues that Defendant's logo infringes Plaintiff's service mark, and, for this reason, Plaintiff is entitled to partial summary judgment on the issue of liability. As a general rule, the gravamen for any action of trademark infringement or common law unfair competition is whether the challenged mark is likely to cause confusion. Marathon, 767 F.2d at 217. According to Fifth Circuit cases addressing trademark infringement and unfair competition, likelihood of confusion is a question of fact which may not be determined by summary judgment. Id. (citing Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 2S2, 257 58 (5th Cir. 1980); T.G.I. Fridays, Inc. v. International Restaurant Group, Inc., 569 F.2d 895, 899 (5th Cir. 1978)). Both parties have demanded a jury trial. The jury must decide whether the logos of the Plaintiff and the Defendant are "confusingly similar." For this reason, the Court denies Plaintiff's Motion for Partial Summary Judgment.

IV. Conclusion

There are issues of material fact in dispute in this action. Defendant is not entitled to judgment as a matter of law. For this reason, Defendant's Motion for Judgment on the Pleadings, or, in the alternative, Motion for Summary Judgment is not well taken and should be denied. Plaintiff's Cross Motion for Partial Summary Judgment also is not well taken and should be denied.

IT IS THEREFORE ORDERED that Defendant's Motion for Judgment on the Pleadings [28-1], or, in the alternative, Motion for Summary Judgment [29-1] should be and hereby is denied.

IT IS FURTHER ORDERED that Plaintiff's Cross Motion for Partial Summary Judgment [73-1] should be and hereby is denied.

SO ORDERED this the 17th day of April, 1998.

"s/ William H. Barbour, Jr."
UNITED STATES DISTRICT JUDGE

APPENDIX G
Motion for Judgment On the Pleadings
Dismissing the Complaint

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 12 1997
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS. CIVIL ACTION NO. 3:97cv534BN

SOUTHERN DEFENSE INITIATIVE CORPORATION DEFENDANT

MOTION FOR JUDGMENT ON THE PLEADINGS
DISMISSING THE COMPLAINT

COMES NOW Southern Defense Initiative Corporation by and through its registered agent and moves for dismissal of the complaint under Rule 12(b) (6) of the F.R.C.P. for failure to state a claim upon which relief can be granted and in support thereof would show and state as follows:

1.

Paragraph 9 of the Complaint alleges various acts by the Defendant all in violation of 15 U.S.C. §1114 (1). This section is confined to use of a registered mark "in connection with the sale, offering for sale, distribution or advertising of any goods or services on or in connection with which such use is likely to cause confusion". As indicated in paragraph 8 of the complaint Defendant is not engaged in sale, offering for sale, distribution or advertising of any goods or service, but rather is engaged solely in advocacy of ideas, support or opposition to political candidates and boycotting commercial firms for political reasons. Therefor 15 U.S.C. §1114 (1) does not apply to Defendant or any of its activities.

2.

Paragraph 10 of the Complaint alleges Defendant falsely represents origin and sponsorship of its publications in violation of 15 U.S.C. §1125(a). As may be seen from Exhibit "C" to the Complaint the SDI logo does not falsely represent the origin of any publication as it is identified as such in plain words. Further, 15 U.S.C. §1125(a) does not apply to Defendant since it is not engaged in sale, offering for sale, distribution or advertising of any goods or services.

3.

Paragraph 11 of the Complaint alleges Defendant has created through false allegations and trade an appearance that Plaintiff has endorsed or sponsored Defendant in violation of Plaintiff's rights at common law. The complaint does not cite any allegations of Defendant which are claimed to be false. The record contains letters from SCV officials (Exhibits "B", "C", and "D" to the Amended Answer) indicating Defendant had taken a position adverse to that of Plaintiff on the response to removal of the state flag of Georgia from the premises of Holiday Inn Worldwide.

4.

Paragraph 13 of the Complaint cites that Plaintiff protested Defendant's use of its logo and that continued use by Defendant thereafter entitles Plaintiff to punitive damages. Defendant was under no duty to refrain from exercise of its constitutional rights because of this complaint. U.S. Supreme Court decisions make plain that the constitutional right of every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweighs societal values such as preserving the symbolic value of the flag (U.S. v. Eichman, 496 U.S. 310) or punishing acts which arouse anger, alarm or resentment in others on the grounds of race, color, creed, religion or gender (R.A.V. v. St. Paul, 505 U.S. 377). The injuries complained of are all theoretical, and no instance where anyone was confused by the Defendant's logo is alleged in the Complaint.

WHEREFORE, premises considered, Defendant prays that the Complaint be dismissed and that Defendant be compensated by Plaintiff for the cost of defending the suit.

Respectfully Submitted,

SOUTHERN DEFENSE INITIATIVE CORPORATION

BY: "s/ Jimmy D. Giles", Registered Agent

APPENDIX H
Motion for Summary Judgment

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 18 1997
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS. CIVIL ACTION NO. 3:97cv534BN

SOUTHERN DEFENSE INITIATIVE CORPORATION DEFENDANT

MOTION FOR SUMMARY JUDGMENT

COMES NOW Southern Defense Initiative Corporation (hereinafter "SDI"), by and through registered agent, to move for Summary Judgment dismissing the Complaint and requiring payment of damages by Plaintiff Sons of Confederate Veterans, Inc., (hereinafter "SCV") in amount to be determined by further proceedings unless agreed between the parties, and in support thereof would show and state as follows:

1.

There is no material question of fact to be decided. The two symbols in question, the SCV Service Mark and the SDI logo are attached to the Complaint, as well as an abundant showing that SDI is engaged in advocating policy changes through political speech, both verbally and by visual symbols. The record also shows that adverse stands have been taken by the parties regarding the appropriate response to insults to the Confederate Battle Flag. It is obvious from the circumstances set forth in the record SCV could gain advantage in the battle of ideas by removing SDI, which it has characterized as inappropriate, racist and libelous (See Plaintiff's Answer to Defendant's Request for Admissions No. 9) by a $1 million punitive damages award, or handicap its opponent through enjoining use by SDI of its logo.

2.

Plaintiff concedes Defendant is entitled to incorporate the Confederate Battle Flag in a logo which is not confusingly similar to the SCV Service Mark. "Confusingly" is an indeterminate expression having no unequivocal limits to its meaning and what is confusingly similar is a matter of judgment. However, Mr. Trapp's letter (Exhibit "D" to the Complaint) points to the elongated hexagons surrounding the flag in the SDI logo. Hexagons, like the Confederate Battle Flag, are in the public domain, and are part and parcel of the flag, an inseparable element of its imagery and symbolism. As may be seen in Exhibits "A" and "B" to this Motion, the outline of each arm of the Cross of St. Andrew superimposed on the square Battle Flag is in the shape of a hexagon having four interior 135 ° angles and two 90° angles at the ends, just as do the hexagons surrounding the flag. The surrounding hexagons reflect back and resonate with the outlines of the arms of the cross. Not by accident or coincidence did the designers of the two symbols, the Service Mark and the logo, wrap themselves, or rather their organization names, in the flag. The purpose of the hexagons enclosing the organization names is to more closely associate the organization with the flag in the mind of the viewer, to borrow credit from this incomparable icon to all patriotic Southerners, the Confederate Battle Flag. Plaintiff's contention is that Defendant can borrow some, but not all, the prestige inuring from close association with the Confederate Battle Flag in the minds of those viewing its logo. The flag is of course the preeminent icon in communicating with Southerners on political matters. As the Court said in West Virginia Board of Education v. Barnett (319 U.S. 624) "the use of a flag... is a shortcut from mind to mind. Contenders in the marketplace of ideas seek to unite the loyalty of their followers to a flag or banner".

3.

The power of Congress to regulate interstate commerce does not extend to regulation of political speech, to allocation of particular areas of discussion to particular speakers, or to granting exclusive use of certain modes of expression to holders of recognized marks. As the Court stated in Texas v. Johnson (491 U.S. 397) "expression of dissatisfaction with the policies of this country (is) expression situated at the core of our First Amendment values". The U.S. Supreme Court has in recent years addressed statutes which limit free and uninhibited expression of political views, allowing certain modes of expressive conduct and prohibiting others. In Reno, Attorney General of the United States et al. v. American Civil Liberties Union et al., No. 96-511 decided June 26, 1997 Justice Stevens disapproved certain provisions of the Communications Decency Act writing "The government position is equivalent to arguing that a statute could ban leaflets on a certain subject as long as people are free to

publish books". In R.A.V. v. St. Paul (505 U.S. 377) the Court invalidated a statute prohibiting cross burning on the basis that this conduct expressed a message which the city was seeking to handicap in favor of the opposite message of tolerance. Disapproving this government intrusion into political debate, Justice Scalia wrote "St. Paul has no such authority to license one side of a debate to fight freestyle while requiring the other to follow the Marquis of Queensberry rules". We submit that the Congress had no power, and indeed no intention, to insulate one contender from the rigors of debate by granting it the exclusive privilege of using any particular attribute of, or element of the symbolism of the Confederate Battle Flag. In United States v. Eichman (496 U.S. 310) overturning the latest attempt by Congress to prohibit burning of the U.S. flag, Justice Stevens (in dissent) summed up the issue as "Does the admittedly important interest in allowing every speaker to choose the method of expressing his or her ideas that he or she deems most effective and appropriate outweigh the societal interest in preserving the symbolic value of the flag?" In striking down the statute the majority opted for free speech over flag. We submit that the issue here is "Does the admittedly important interest of allowing every speaker to choose the method of expressing his or her ideas which he or she deems most effective and appropriate outweigh a mere privilege granted as a matter of course for the purpose promoting commerce?" We are confident that in the hierarchy of values established by the U.S. Constitution unabridged free speech is paramount.

4.

Neither SCV or SDI is engaged in peddling shampoo or soda or investment advice. According to Paragraphs 6 and 8 of the Complaint SCV is "dedicated" and SDI is "committed" to a proper interpretation of the facts of Civil War history. It is widely known that these facts, and particularly the proper role for the Confederate Battle Flag in present day society, have provoked intense political controversy, erupting into legislative battles in the Georgia and South Carolina state houses, and such moves as Chancellor Khayat's campaign to ban display of the flag at University of Mississippi football games. Members of Congress who over past generations have dealt with matters pertaining to the regulation of interstate commerce might be shocked to learn that the results of their efforts can be imported into the arena of political debate, and used or abused by one combatant to silence or mute the voice of an opponent. In fact, they wrote no such law. Paragraphs 9 and 10 of the Complaint allege conduct by the Defendant in violation of 15 U.S.C. §1114 (1) and 15 U.S.C. §1125(a), but these laws are confined exclusively to sale, offering for sale, distribution or advertising of goods or services, and thus

inapplicable to Defendant, which does not engage in any of these activities.

5.

Paragraph 11 of the Complaint alleges violation of Plaintiff's rights at common law creating appearance of endorsement or sponsorship through false allegations. The Complaint fails to cite any allegations claimed to be false. All the injuries complained of are theoretical only, and no instance where anyone ever confused the two organizations is cited. If Plaintiff's interest would suffer through inability to have exclusive use of certain attributes of, or of certain elements of the symbolism of the Confederate Battle Flag, this is a circumstance inherent in the American system of constitutional government, particularly the right to unabridged freedom of speech guaranteed by the First Amendment, not any illegal conduct by Defendant. All the conduct complained of involved Defendant's Internet web site. Judge Dalzell of the three-judge District Court which enjoined enforcement of key provisions of the Communications Decency Act wrote (quoted in Reno et al v. A.C.L.U. et al. affirmed by the Supreme Court June 26, 1997) "...the Internet as the most participatory form of mass speech yet developed is entitled to the highest protection from government intrusion".

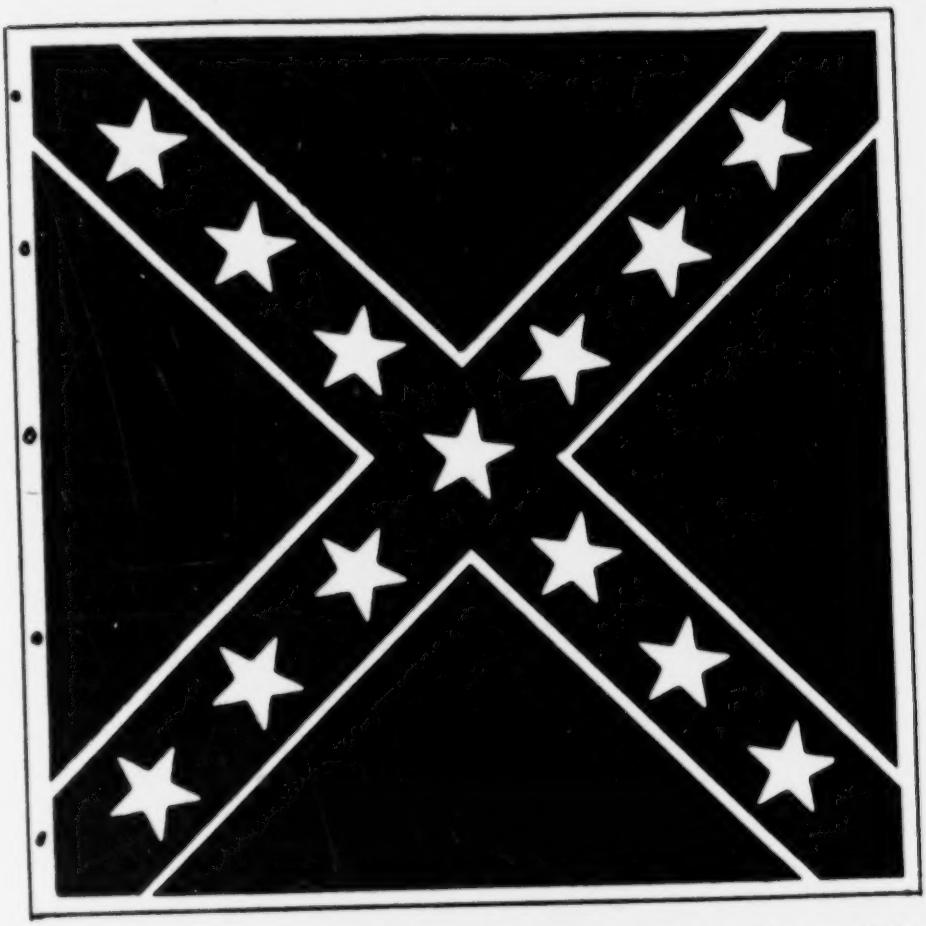
WHEREFORE, premises considered, Defendant prays for the relief mentioned in the first paragraph of this Motion, and such other relief as it may be entitled to in law or equity.

Respectfully Submitted,

SOUTHERN DEFENSE INITIATIVE CORPORATION

BY: "s/ Jimmy D. Giles", Registered Agent

CONFEDERATE BATTLE FLAG



The Confederate Battle Flag is square with an X shaped blue cross, edged with white, with thirteen equal five-pointed stars upon a red field: with the whole banner bordered in white.

NOTE: The outline of each arm of the cross is hexagonal in shape.

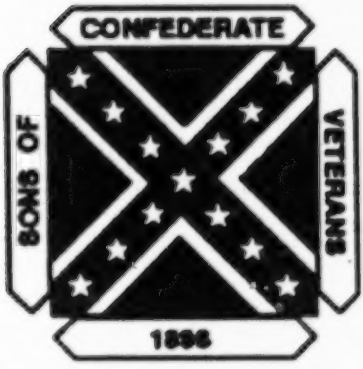
EXHIBIT "A"

SDI Logo

The SDI Logo is:

- square
- with an X shaped blue cross, edged with white
- with thirteen equal five-pointed stars
- upon a red field
- with the whole banner bordered in white with 4 hexagons enclosing SOUTHERN DEFENSE INITIATIVE CORPORATION.

SCV Service Mark



The SDI Logo is:

- square
- with an X shaped blue cross, edged with white
- with thirteen equal five-pointed stars
- upon a red field
- with the whole banner bordered in white with 4 hexagons enclosing SONS OF CONFEDERATE VETERANS 1896.

EXHIBIT "B"

APPENDIX I
Motion for Dismissal for Lack of Jurisdiction

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
NOV 21 1997
J.T. NOBLIN, CLERK
BY "s/ Michelle Beard" DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SONS OF CONFEDERATE VETERANS, INC. PLAINTIFF

VS. CIVIL ACTION NO. 3:97cv534BN

SOUTHERN DEFENSE INITIATIVE CORPORATION DEFENDANT

MOTION FOR DISMISSAL FOR LACK OF JURISDICTION

COMES NOW Southern Defense Initiative Corporation by and through its registered agent and moves for dismissal of the Complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the F.R.C.P. and in support thereof would show and state as follows:

1.

Paragraphs 9 and 10 of the Complaint allege conduct by Defendant in violation of 15 U.S.C. §1114(1) and 15 U.S.C. §1125(a) respectively by use of a logo on its Internet web site which is alleged to be confusingly similar to Plaintiff's "service mark". These sections apply exclusively to sale, offering for sale, distribution or advertising of goods or services. Defendant does not engage in any of these activities, nor is there any averment in the Complaint or any of the Exhibits attached thereto that such is the case. Therefore the Court lacks jurisdiction to grant relief for the injuries so alleged.

2.

Paragraph 11 of the Complaint alleges conduct by Defendant in violation of Plaintiff's rights at common law. As provided in 28 U.S.C. §1332(c)(1) the Court lacks jurisdiction of this claim because there is no complete diversity of citizenship of the parties, both being corporations organized and existing under the laws of the State of Mississippi.

WHEREFORE, PREMISES CONSIDERED, Defendant prays for dismissal of the Complaint.

Respectfully Submitted,

SOUTHERN DEFENSE INITIATIVE CORPORATION

BY: "s/ Jimmy D. Giles", Registered Agent

APPENDIX J
The Lanham Act (15 U.S.C. §1114 *et seq.*)

15 U.S.C. §1114. Remedies; infringement; innocent infringement by printers and publishers

(1) Any person who shall, without the consent of the registrant--

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or

(b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive. shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion, or to cause mistake, or to deceive.

15 U.S.C. §1117. Recovery for violation of rights; profits, damages and costs; attorney fees; treble damages

(a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 43(a) [15 USCS Sect. 1125(a)], shall have been established in any civil action arising under this Act [15 USCS Sects. 1051 et seq.], the plaintiff shall be entitled, subject to the provisions of sections 29 and 32 [15 USCS Sects. 1111, 1114], and subject to the principles of equity, to recover

(1) defendant's profits,

(2) any damages sustained by the plaintiff, and

(3) the costs of the action.

The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

(b) In assessing damages under subsection (a), the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee, in the case of any violation of section 32(1)(a) of this Act (15 U.S.C. 1114(1)(a)) [(1) "(a)"15 USCS Sect. 1114(1)(a)] or section 110 of the Act entitled "An Act to incorporate the United States Olympic Association", approved September 21, 1950 (36 U.S.C. 380) [36 USCS Sect. 380] that consists of intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark (as defined in section 34(d) of this Act (15 U.S.C. 1116(d)) [15 USCS Sect. 1116(d)], in connection with the sale, offering for sale, or distribution of goods or services. In such cases, the court may in its discretion award prejudgment interest on such amount at an annual interest rate established under section 6621 of the Internal Revenue Code of 1954 [26 USCS Sect. 6621], commencing on the date of the service of the claimant's pleadings setting forth the claim for such entry and ending on the date such entry is made, or for such shorter time as the court deems appropriate.

15 U.S.C. §1121. Jurisdiction of Federal courts; State and local requirements that registered trademarks be altered or displayed differently; prohibition

(a) The district and territorial courts of the United States shall have original jurisdiction, the circuit courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) [and the United States Court of Appeals for the District of Columbia] shall have appellate jurisdiction, of all actions arising under this Act [15 USCS Sects.

1051 et seq.], without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(b) No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

15 U.S.C. §1125. False designations of origin and false descriptions forbidden

(a) Civil action. Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin or his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

APPENDIX K
28 U.S.C. §1332 *et seq.*

28 U.S.C. §1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between -

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

28 U.S.C. §1338. Patents, plant variety protection, copyrights, mask works, trade-marks, and unfair competition

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trade-mark laws.